

BOOKS AND ARTICLES



Droit international humanitaire

Jean D'Aspremont and Jérôme de Hemptinne*

Book review by Antoine P. Kaboré, Teaching Assistant at the Geneva Academy of International Humanitarian Law and Human Rights.

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There can be no doubt about the usefulness of this book given its subject matter. After all, armed conflicts are an almost daily reality for humanity and regulating them is more important than ever. We would all love to live in a world without armed conflicts, with no need for international humanitarian law (IHL), but one need only look at what is happening in Syria or South Sudan to realize that such a world is a utopia. This is why continuous efforts are needed to promote and develop this body of law in order to make it more effective and enhance the protection it affords. In publishing this book, Jean D'Aspremont and Jérôme de Hemptinne contribute to such efforts. Given the scarcity of francophone literature in IHL, this book fills also a “gap” in that sense, even if *Principes de droit des conflits armés* by Eric David remains a very valuable and outstanding contribution to the field. *Droit international humanitaire* has already been reviewed elsewhere by Professor Julia Grignon;¹ without repeating the points already highlighted there, this appraisal will briefly address both the format and the content of the book.

In terms of format, there are several noteworthy features. Overall, the book is easy to read and flows well, despite a few typos. The authors write in simple language, making the book easy to follow and understand. The decision to organize the book into themes rather than having a linear description of IHL is useful and user-friendly, but also less instructive. It is likely to suit readers who

* Published by Éditions A. Pedone, 2012.

are interested in a specific aspect of IHL. However, despite the introduction and the fact that the fourteen themes cover the essential points, it is less instructive for those who need to grasp the structure and the background of the subject matter before getting into the more in-depth discussions on specific topics. Despite these slight issues, the book remains very useful for any type of audience, including academia, practitioners and military lawyers.

The summary and the bibliography at the end of each chapter are unquestionably useful.² The summary gives an overview of the issues addressed in the chapter, and the bibliography enables readers to pursue their research on a specific topic. Not to be overlooked is the decision to include a final chapter that deals with conclusions and future prospects, which gives the reader not just a general summary of the book, but also – and above all – a sense of the main issues concerning each theme therein.

In terms of content, a notable feature of the book is the fact that all the themes are addressed by means of rich discussion, drawing on legal opinion and theory (particularly in the reference documents of the International Committee of the Red Cross (ICRC), the “guardian” of IHL) as well as case law. The authors also go further than simply describing the rules; they do not hesitate to take a stand on certain “burning issues” (see below).

The aim of this review is not to discuss each of the particular themes covered in the book, but rather to point out a few themes that the authors have selected which may give rise to some interesting conversations on the effectiveness of IHL.

In Chapter 2, the authors address the difficulties of demonstrating the existence of customary rules of IHL. This discussion is of twofold relevance for the law of non-international armed conflict: first, it raises the issue of the systematic (or not) transposition of customary rules applicable to international armed conflicts to non-international armed conflicts;³ and second, it links to the question of the extent to which the practice of organized armed groups can be taken into account in the development of customary rules of IHL. This in turn links to the discussion of the basis for the applicability of IHL to organized armed groups. This problem is addressed in Chapter 5, where the authors have tried to systematically justify this basis in terms of both treaty law and customary law, neither of which prove to be satisfactory given the current state of IHL. The authors are therefore urged to further develop and share their thinking on this issue in the future.

The discussions about the distinction between international and non-international armed conflicts in Chapter 3 are very important for the future of IHL. The authors contend that this distinction tends to become less marked once customary law comes into play, and IHL will probably lose any such

1 Julia Grignon, “Jean D’Aspremont and Jérôme de Hemptinne, *Droit international humanitaire*”, *Journal of International Criminal Justice*, Vol.11, No.3, 2013, pp. 688–690.

2 *Ibid.*

3 *Ibid.*

categorization in the future. They also draw conclusions about what the possible loss of such a distinction would mean for international criminal law, particularly as regards the scope of war crimes. Noting that the definition of these crimes is still dependent on the distinction between the two categories of armed conflicts, they immediately and rightly point out that efforts should be made to harmonize the scope of these crimes in both categories (leaving some room for manoeuvre if necessary), in order to strengthen protection for victims of armed conflicts. An in-depth study of the relevance of the traditional distinction between these two types of armed conflict, and the implications of ending that distinction, is therefore called for.

Chapter 4, on the intersection between IHL and international human rights law in armed conflict, is noteworthy because the authors offer a very original interpretation of the case law of the International Court of Justice (ICJ). Most legal literature quotes word-for-word the famous paragraph 25 of the ICJ's Advisory Opinion of 8 July 1996 on the threat or use of nuclear weapons⁴ to conclude that, according to the ICJ, humanitarian law constitutes *lex specialis* in armed conflict. In their book, D'Aspremont and de Hemptinne subtly assert that in fact, the ICJ's reasoning was intended not to resolve the conflict that exists between these two bodies of law in terms of the right to life, but rather to get around it by means of a so-called "systemic" interpretation. While disputable, this is certainly an original interpretation. It supports their assertion that standards to protect human rights are undergoing a "humanitarianization", while IHL itself experiences a "humanization" when international criminal courts turn to human rights rules to define some war crimes. Contrary, therefore, to the generally accepted view that human rights and IHL are irreconcilable on certain matters, such as the prohibition on arbitrary deprivation of life, the authors' take is that the "humanitarianization" and "humanization" of the two bodies of law, respectively, could ultimately bring about their harmonization.

Some might say that such an approach is doomed to fail, given the extent of the differences between the two systems, but as another author has pointed out, "the reconciliation of human rights law and the law of armed conflict in a manner that provides a comparatively seamless and coherent set of rules across the spectrum of violence may be the challenge of the next generation of international lawyers".⁵ The authors of this book therefore deserve credit for actively contributing to galvanizing this discussion. Let us hope that they intend to continue to do so in their future work, with a view to finding a satisfactory solution for the harmonious coexistence and mutually reinforcing role of human rights law and IHL for the protection of the human person.

It is also worth pointing out the special attention given to the principle of distinction between civilians and combatants, to which the entirety of Chapter 8 is

4 ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Reports 1996, para. 25.

5 Charles Garraway, "The Changing Character of the Participants in War: Civilianization of Warfighting and the Concept of 'Direct Participation in Hostilities'", *International Law Studies*, Vol. 87, U.S. Naval War College, 2011, p. 184.

dedicated. Given the importance of this rule – described as the cornerstone of IHL by the authors – and the difficulties in implementing it during the conduct of hostilities, it is reasonable to agree with them that such special attention is warranted. Although they consider that the traditional form of the principle of distinction can cope with the new challenges posed by armed conflicts, the authors nevertheless recognize that the changing nature of contemporary armed conflicts, coupled with the inadequacies of treaty-based and customary humanitarian law when it comes in particular to the status of persons in non-international armed conflicts, does not make life easier for the commanders (giving orders) or the soldiers (executing such orders) on the ground. Despite the efforts of certain organizations, like the ICRC, to clarify concepts such as that of “direct participation in hostilities”,⁶ there are still difficulties in implementing the principle of distinction, particularly in non-international armed conflicts, situations of occupation and military counterterrorism operations. The authors recognize this and offer a very insightful discussion of the issue. This prompts the reader to make a link with the discussion of the interaction between IHL and human rights. After all, given that the task of implementing the principle of distinction is almost impossible, it is perfectly legitimate to wonder whether the idea of unification – or at least of a pragmatic convergence – between the two legal regimes on the use of lethal force would not resolve the problem.

Of course, the book is not confined to the points discussed here; it covers others that are just as important and just as well addressed. IHL cannot be analysed today without addressing such issues as occupation (Chapter 6), United Nations forces (Chapter 7), the other principles of the conduct of hostilities (Chapter 9), prisoners of war and civilian internees (Chapter 10), the separation between *jus in bello* and *jus ad bellum* (Chapter 11), international implementation (Chapter 12), State responsibility (Chapter 13) and internal repression (Chapter 14).

All in all, this book is noteworthy for what it brings to the discussions about the burning issues of IHL today. More concretely, contemporary issues of IHL are addressed with a fresh and original view. This is especially true for the analysis of the relationship between IHL and human rights law, the identification of customary rules of IHL, the difficulties of implementing the principle of distinction due to the changing nature of armed conflicts, and the (ir)relevance of the distinction between international and non-international armed conflicts. The authors should be proud of such an achievement and are urged to do still more for a cause as noble as strengthening the promotion and effectiveness of this body of law.

6 See Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, ICRC, Geneva, 2009.